permit a collateral attack, in the tax proceeding, on the administrative decision in certifying only part of the cost of the facilities, while the Court of Claims does precisely the contrary.

In these circumstances, there is a clear and direct conflict in decisions. For that reason, and for the additional reasons stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

HILBERT P. ZARKY,
Attorney.

JUNE, 1956.

INDEX

CITATIONS

Cases—Continued

Statutes:

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 78

UNITED STATES OF AMERICA, PETITIONER

v.

THE ALLEN-BRADLEY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 14–15) has not been officially reported.

JURISDICTION

The order of the Court of Claims granting taxpayer's motion for summary judgment was entered on April 3, 1956. (R. 14.) The petition for a writ of certiorari, filed on May 3, 1956, was granted on June 11, 1956. (R. 15.) The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether the War Production Board,[1] in issuing necessity certificates for accelerated amortization, had authority to certify only part of the cost of a new facility.

2. Whether the legality of the Board's action in issuing such certificates can be tested many years later by a collateral attack in a suit for refund of taxes, rather than through direct review. Stated otherwise, the question is, assuming the Board had no authority to issue "partial cost" certificates, whether the Court of Claims could properly enter a judgment for refund of taxes as though the taxpayer had received certificates for 100% of the cost of facilities when, in fact, the certificates issued by the Board were for only part of the costs.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of Sections 23 (t), 124 (a), (d), (e), (f) and (g) and 124A of the Internal Revenue Code of 1939, of Executive Orders 9406 and 9429, of Sections 1, 2, 3, 5 and 9 of the Regulations and Amended Regulations Governing The Issuance of Necessity Certificates Under Section 124 (f) of the Internal Revenue Code of 1939, and of Section

[1] As appears *infra*, pp. 19, 21, in the detailed history of the pertinent statutory provisions, the Secretaries of War and Navy originally were empowered to issue certificates of necessity; this function was later transferred to the War Production Board. Although one of the certificates in this case was issued by the Secretary of War, for brevity's sake we have referred generally to the War Production Board as the certifying authority.

29.124–6 of Treasury Regulations 111, are set forth in Appendix A, *infra*, pp. 58–79.

STATEMENT

The facts alleged in the taxpayer's petition (R. 1–11) and admitted in the Government's answer (R. 11–12), upon the basis of which the Court of Claims granted taxpayer's motion for summary judgment (R. 14–15), may be summarized as follows:

During World War II, taxpayer, a Wisconsin corporation, was engaged in the manufacture of motor controls, radio resistors and other radio parts, which were in short supply at the time. Directly and indirectly, substantial quantities of taxpayer's products were utilized in equipment used in the prosecution of the war. Taxpayer was requested by procurement officers of the Government to increase its production of these products. Accordingly, taxpayer improved and increased its plant facilities and obtained the necessary machinery and equipment to increase its production substantially. (R. 1, 3, 11.)

In connection with such expansion, taxpayer applied for and was issued nine certificates of necessity under the provisions of Section 124 of the Internal Revenue Code of 1939, relating to accelerated amortization deductions with respect to emergency facilities. In each instance the duly designated certifying authority determined that facilities described in taxpayer's application were necessary in the interest of national defense;[2] however, in three instances the cer-

[2] Part of the machinery and equipment listed in taxpayer's application was deleted by the certifying authority in issuing one of the certificates of necessity here in issue. (R. 6.)

tifying authority certified that only part of the cost of such facilities was necessary for the national defense. The issuance of these certificates for less than 100% of cost was in accordance with an established policy not to permit deductions for accelerated amortization of the entire cost of facilities which were determined to possess post-war utility. (R. 4, 11.)

The first certificate in question, Amendatory Necessity Certificate WD–N–27705–A, issued on December 23, 1943, certified that the facilities described in taxpayer's application were "necessary in the interest of National Defense during the emergency period, up to 80% of the cost attributable to the construction, erection, installation or acquisition thereof * * *". As alleged by the taxpayer, this certificate had been issued to amend Certificate WD–N–27705, dated November 30, 1943, which had certified that the facilities were necessary only up to 25% of their cost, and which taxpayer had returned to the Secretary of War informing him that the terms of the certificate certifying only 25% of the cost were unacceptable to taxpayer and, therefore, that it was unwilling to proceed with the project for which it intended to use the facilities. (R. 5–6.) The facilities described by the amended 80% certificate were constructed, purchased and installed at a cost of $1,014,930.34. (R. 11.)

The second certificate, NC–2631, issued on March 30, 1944, certified that part of the machinery and equipment described in taxpayer's application was "necessary in the interest of National Defense during the emergency period up to 85% of the cost attributable to the construction, reconstruction, erection and in-

stallation or acquisition thereof, * * *". These facilities were purchased and installed at a cost of $125,990.28. (R. 6–7, 11.)

The third certificate, NC–8542, issued on April 4, 1945, and amended on July 21, 1945, certified machinery and equipment described in taxpayer's application to be "necessary in the interest of National Defense during the emergency period up to 35% of the cost attributable to the acquisition thereof provided such facilities are received prior to August 31, 1954".[3] The described facilities were purchased and installed at a cost of $38,913.75. (R. 5–7, 11.)

The language contained in these three certificates of necessity is almost identical to the language contained in the certificates of necessity issued to the taxpayers in *Wickes Corp.* v. *United States,* 108 F. Supp. 616 (C. Cls.) and *Ohio Power Co.* v. *United States,* 129 F.

[3] Taxpayer's original application with respect to such machinery and equipment was filed on February 13, 1945. (R. 7, 11.) By letter, dated March 20, 1945, the certifying authority advised taxpayer as follows (R. 4, 11):

> The above application is in course of approval for 35% certification, rather than full certification as requested in your transmittal letter of February tenth, inasmuch as all of the facilities appear to be standard machine tools usable for production of a variety of peace-time articles, not special tools usable only for specific war production for which you propose to use them.

On March 30, 1945, taxpayer mailed to the certifying authority a revised list of machinery and equipment to be included in its application of February 13, 1945. By letter dated July 13, 1945, taxpayer requested that the certificate issued on April 4, 1945, be, and it subsequently was, amended to provide for acquisition of the facilities prior to August 31, 1945, rather than July 15, 1945. (R. 7, 11.)

Supp. 215 (C. Cls.), certiorari denied, 350 U. S. 862, rehearing denied, 350 U. S. 919, motion for leave to file petition for rehearing denied, 351 U. S. 958, order denying petition for rehearing vacated, June 11, 1956 (No. 312, Oct. Term 1955). (R. 8, 11.)

In accordance with the provisions of Section 124 of the Internal Revenue Code of 1939, taxpayer elected to take accelerated amortization deductions with respect to its emergency facilities over a period which began with the month following their acquisition and terminated on September 30, 1945. (R. 8–9, 11.) In its tax returns taxpayer computed its amortization deductions in accordance with the percentages of cost set forth in these three certificates of necessity, the remaining cost being treated as subject to ordinary depreciation allowances.

On March 30, 1953, taxpayer filed claims for refund of excess profits tax and declared value excess profits tax for its fiscal years ending November 30, 1944, and November 30, 1945, based on its assertion that it was entitled to amortize 100% of the cost of the facilities during the period ending September 30, 1945, and was not to be restricted to amortization of the percentages of cost designated in the certificates of necessity. After the Commissioner of Internal Revenue had rejected the claims for refund, this action was instituted in the Court of Claims seeking a refund of taxes allegedly overpaid because of taxpayer's failure to take deductions for accelerated amortization of the entire cost of the facilities. (R. 10, 12.)

The Court of Claims granted the taxpayer's motion for summary judgment on the authority of its own

prior decisions in the *Wickes Corp.* and *Ohio Power Co.* cases, and refused to follow the contrary decision of the Court of Appeals for the Second Circuit in *Commissioner* v. *National Lead Co.*, 230 F. 2d 161, certiorari granted, 351 U. S. 981 (No. 124, this term). Chief Judge Jones dissented. (R. 14–15.)

SUMMARY OF ARGUMENT

The ultimate question is whether taxpayer is entitled to amortization deductions with respect to 100% of the cost of certain emergency facilities, notwithstanding (a) that only part of such cost was certified by the War Production Board as being necessary in the interest of national defense, and (b) that taxpayer first challenged the validity of the certifying agency's action many years later by way of a collateral attack in this tax refund suit. The Government contends (a) that the relevant statutory provisions amply empowered the Board, where it found the facts so required, to certify that only part of the cost of a new facility was necessary in the interest of national defense, and (b) that, in any event, assuming the Board was authorized to grant either a 100% certificate or none at all, the Court of Claims could not, in this collateral proceeding, enter a judgment for refund of taxes just as though the Board had in this case issued 100% certificates when the certificates actually issued by the Board were for only part of the cost. Had the Board been aware that it could choose only between a zero or 100% certification, it might well have chosen the former. The court below exceeded the proper limits of its judicial function in entering a

judgment for tax refund based on 100% certificates never issued by the only agency having legal authority to issue them.

I

The amortization deduction provisions were added in 1940 to the Internal Revenue Code of 1939 for the purpose of counteracting one of the factors which had been discouraging private investment in defense production facilities. Since, generally, facilities of the kind needed for the rearmament program could be expected to earn income only during the emergency period and because there was no assurance that the capital invested in such facilities could be completely recouped by depreciation deductions during the period when they produced income, private investors had evidenced a reluctance to finance the needed expansion. Accordingly, provisions were added to the 1939 Internal Revenue Code authorizing deductions for accelerated amortization over a period of 5 years or less of the adjusted basis of emergency facilities to the extent that such facilities were certified as necessary in the interest of national defense during the emergency period, in accordance with such regulations as might be prescribed from time to time by the certifying agency with the approval of the President. If only part of the cost of an emergency facility was certified as necessary, the remaining part was subject to normal depreciation deductions.

The granting of accelerated amortization deductions had the effect of indirect Government financing of the needed production facilities to the extent that

a corresponding reduction in taxes was achieved during a period when tax rates were high. Other alternative methods of direct Government financing of facilities were also employed.

Determination of the extent to which facilities should be certified as necessary in the interest of national defense involved many difficult and complex problems so that allowance for flexibility in the administration of the certification program was imperative. Not only was the certifying authority required to consider the desirability of facilities for producing a vast variety of products but it was also necessary not merely to weigh a particular facility's desirability in the abstract but to consider the advantages and disadvantages of alternative methods of financing. Moreover, changing conditions, such as supply and demand with respect to a particular product and availability of other facilities to produce it, made certain facilities more desirable at one time than at another.

By the spring of 1943, it was concluded that the chief limiting factor in the production of war supplies was no longer facility capacity but materials and manpower, and that maximum war production required not an encouragement of facility expansion but a curbing of it. Accordingly, it was decided to restrict substantially the issuance of necessity certificates. In line with the policy of limiting certification, the general practice of issuing percentage certificates was adopted by the War Production Board. Under this practice 100% certificates were not issued with respect to facilities which had post-war utility,

since such facilities would be readily resaleable after the emergency and since the Government would be able to realize the post-war value if they were constructed through direct Government financing. Consequently, it was the established administrative policy that private financing of such facilities would be encouraged, where appropriate, by their being certified only to the extent of their war-induced costs.

We believe it is clear that Congress intended to and did grant the widest discretion to the administrative officials in making their determination of whether, and the extent to which, facilities should be certified as necessary in the interest of national defense. Consideration of the textual provisions of the entire statute, the basic, underlying Congressional purpose, the contemporaneous administrative construction, and all other relevant aids to interpretation support the conclusion that Congress did not preclude the Board from certifying part rather than all of the costs of a particular facility. To conclude otherwise is to assume that Congress intended to hamstring the Board in carrying out an essential defense function, and that it meant, in effect, to compel the squandering of public funds.

The view of the court below that the certifying authority was required to issue 100% certificates or none at all is based on the premise that Congress intended that the cost of the certification program, in lost revenue, to the Government could not properly be taken into consideration in the issuance of necessity certificates with respect to post–1939 construction of emergency facilities. But it was with

this very cost in mind that Congress amended the statute on October 30, 1941, to require the President's approval of regulations to be issued governing the issuance of necessity certificates, and the regulations so approved expressly provided for percentage certifications. Moreover, the Board consistently construed the statute as permitting the issuance of percentage certificates, and the three certificates in question in this case embodied its determination that only part, and not all, of the cost of the facilities involved was necessary in the interest of the national defense.

II

Even assuming, *arguendo,* that the statute did not authorize the issuance of percentage certificates, the court below disregarded two other factors, either of which would preclude entry of the judgment for refund of taxes sought by the taxpayer here. First, the deductions claimed by taxpayer are allowable only when the full cost of the entire property has been certified as necessary in the interest of the national defense. No such determination has been or was intended to be made by the certifying authority with respect to the facilities here in question. The Court of Claims had no authority to make such a determination and had no jurisdiction, under any circumstances, to treat this case as if the certifying agency had made such a 100% determination, even if it be assumed that an erroneous standard had been applied by the agency. *Federal Power Commission* v. *Idaho Power Co.,* 344 U. S. 17.

Secondly, having accepted the benefits of the necessity certificates in question without protest or challenge at a time when the certifying agency could have still exercised its discretion to refuse to issue any certificates,[4] taxpayer can not many years later successfully challenge the validity of such certificate for the first time by way of a collateral attack in this tax refund suit.

Only part of the cost of the facilities in issue having been duly certified as necessary in the interest of national defense, taxpayer is not entitled to amortization deductions for the entire cost of such facilities.

ARGUMENT

SINCE ONLY PART OF THE COST OF CERTAIN FACILITIES HAD BEEN CERTIFIED AS NECESSARY IN THE INTEREST OF THE NATIONAL DEFENSE, THE TAXPAYER IS NOT ENTITLED TO AMORTIZATION DEDUCTIONS FOR THE FULL COST OF THE FACILITIES

A. *Preliminary*

The ultimate issue in this case is whether the taxpayer is entitled, in computing its tax liability, to accelerated amortization deductions for the full cost of certain facilities, notwithstanding (a) that only a stated portion of the cost had been certified as being necessary to the national defense and eligible for rapid

[4] As appears *supra*, p. 4, the first certificate was originally issued for 25% of cost, but after taxpayer refused to accept that figure, the Secretary of War raised it to 80%. Prior to this suit in the Court of Claims, taxpayer took no steps, administratively or judicially, attacking the 80% figure.

tax amortization,[5] and (b) taxpayer first disputed the validity of the certificates many years later (ranging roughly from 7 to 9 years) by way of a collateral attack on the certifying agency's decision in this tax refund suit.

In deciding that the War Production Board[6] had no authority to issue certificates for less than 100% of the cost of the facilities in circumstances where it had determined that the facilities would have a substantial post-war utility to the taxpayer, and in holding, further, that a taxpayer to whom partial certificates were issued could collaterally attack the validity of the certificates in a tax refund suit and could be permitted to take amortization deductions just as though the Board had issued 100% certificates, the Court of Claims reached a decision which is erroneous in all respects.

We shall first summarize the relevant statutory provisions, the circumstances which prompted their enactment, and the reasons which led to the administrative action in situations, of which this case is typical, where partial certificates of necessity were issued.

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[5] The certificates in question certified facilities as described (including an estimated cost) to be "necessary in the interest of national defense during the emergency period, up to [a designed percentage] of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof * * *." For convenience, we shall refer to such certification as being a certification of a percentage or part of the cost of the facilities.

[6] See footnote 1, *supra*, p. 2.

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1. *The amortization provisions of the statute: their background and general scope.*—The amortization deduction provisions (Sections 23 (t) and 124, Appendix A, *infra,* pp. 58–61) were added to the Internal Revenue Code of 1939 by the Second Revenue Act of 1940, c. 757, 54 Stat. 974. That Act, enacted at a time when the United States was launching a defense program of unprecedented magnitude requiring a sudden, large-scale expansion of production facilities, contained three interrelated features, each of great importance to the financial aspects of such program—(1) a corporate excess profits tax, intended not only to raise needed revenue but also to assist in preventing an inflationary spiral and to remove the "opportunity for the creation of new war millionaires or the further substantial enrichment of already wealthy persons", (2) suspension of the profit limitations under the Vinson-Trammell Act relating to construction or manufacture of naval vessels and army and navy aircraft, and (3) special amortization provisions with respect to defense production facilities—provisions designed to encourage the participation of private enterprise in the rearmament program. See H. Rep. No. 2894, 76th Cong., 3d Sess., pp. 1–2 (1940–2 Cum. Bull. 496).

The basic objective of the amortization deduction provisions, in seeking to encourage private investment in defense production facilities, was to counteract one of the existing factors which had been dis-

couraging such investment.[1] Although emergency plant facilities might possess economic utility during a much shorter span than their estimated physical life, Treasury officials were convinced that, under existing legislation, adequate authority did not exist to shorten the normal period of depreciation or obsolescence. Since, generally, plant facilities of the kind needed by the Government could be expected to earn income only during the emergency period (when the tax rates would be high) and because there was no assurance that the capital investment in such plants could be completely recouped by depreciation deductions during the precise period when they produced the income, the Government had witnessed a

[1] The amortization deduction as an inducement to the expansion of privately financed plant facilities is discussed in: The Civilian Production Administration's official history, I *Industrial Mobilization for War—History of the War Production Board and Predecessor Agencies* (1940–1945), pp. 25–26; Civilian Production Administration, *Policies Governing Private Financing of Emergency Facilities, May 1940 to June 1942, Historical Reports on War Administration; War Production Board Special Study No. 12*, pp. 4–44; and David Ginsburg, *The Amortization Deduction, Address before the Practicing Law Institute, New York City, March 24, 1941* (Office for Emergency Management Press Release, PM–252), pp. 1–27. See also: Joint Hearings on Excess Profits Taxation, Amortization, and Suspension of Vinson-Trammell Act, 76th Cong., 3d Sess., Statements of Secretary of War Henry L. Stimson (pp. 21–28), Assistant Secretary of the Navy Lewis Compton (pp. 29–30), William S. Knudsen, Chairman, National Defense Advisory Commission (p. 47), John L. Sullivan, Assistant Secretary of the Treasury (pp. 74–78); Senate Finance Committee Hearings on Second Revenue Act of 1940, 76th Cong., 3d Sess., Statements of John L. Sullivan (pp. 123–131), William S. Knudsen (p. 158), John D. Biggers and Leon Henderson of the National Defense Advisory Commission (pp. 166–186).

reluctance on the part of private capital to finance the needed expansion. Consequently, representatives of the executive branch urged the Congress to enact express provisions in the tax laws which would permit rapid amortization and provide a necessary incentive where private financing of production facilities was desirable. Thus, Secretary of War Stimson, testifying in favor of the proposed legislation, stated (Joint Hearings before the House Committee on Ways and Means and the Senate Committee on Finance, 76th Cong., 3d Sess., Excess Profits Taxation, 1940, p. 23):

> Risks are inherent in any business enterprise. Industry may be expected to undertake normal risks. But the risk to industry of undertaking at the request of the Government to expand plant capacity at industry's own expense *and of then being left, upon a sudden cessation of the emergency, with these expanded facilities useless,* is one that is entitled, in my opinion, to special consideration. [Emphasis added.]

Assistant Secretary of the Treasury Sullivan testified to the same effect (p. 75):

> *In those cases in which the plant and equipment will have little or no other use after the completion of the defense program,* the [normal] rate of depreciation must be increased if the manufacturer is to have the opportunity of charging the cost against income during the period of the emergency. [Emphasis added.]

In reporting out the bill which became the Second Revenue Act of 1940, the House Ways and Means Committee stated (H. Rep. No. 2894, 76th Cong., 3d Sess., p. 16 (1940–2 Cum. Bull. 496, 507–508):

> Your committee has been informed by the Advisory Commission to the Council of National Defense that substantial amounts of private capital will not be invested in the construction of such facilities unless corporations are assured, *in view of the fact that such facilities will be of use chiefly only during the period of national emergency,* that they will be permitted to amortize the cost thereof over a shorter period than would be permitted under the depreciation provision of the Internal Revenue Code. [Emphasis added.]

Accordingly, Sections 23 (t) and 124 were added to the Internal Revenue Code of 1939, authorizing (Section 124 (a)) deductions for accelerated amortization over a period of five years or less[8] of the adjusted basis (determined under Section 124 (f)) of emergency facilities (defined in Section 124 (e)), to the extent that such facilities were certified (under Section 124 (f)) as necessary in the interest of national defense during the emergency period, such certification to be under such regulations as might be prescribed from time to time by the Secretary of War

[8] The normal period of amortization is 60 months. However, under Section 124 (d) a taxpayer has the option, upon the Presidential proclamation that the emergency has ended, to terminate his deductions and to recompute them over the elapsed period. In the present case, for example, since the taxpayer availed itself of this option, and since the emergency was terminated on September 29, 1945 (10 Fed. Register 12475), the taxpayer, under the decision below, would be entitled to amortize the *entire cost* of the facilities over periods ranging from approximately two years to one month notwithstanding the fact that the useful, economic life of such facilities extended far beyond these periods.

and the Secretary of the Navy, with the approval of the President. If only part of the cost of an emergency facility was certified as necessary in the interest of the national defense, the remaining part of the cost was subject to normal depreciation deductions. Section 124 (g).

The granting of rapid amortization, it should be emphasized, was only one of several methods employed to obtain an expansion of production facilities. Other methods included the construction of facilities to be owned by the Government directly and the acquisition of facilities under the so-called Emergency Plant Facilities Contracts, where the Government reimbursed the contractor for the costs of construction, the title to the facilities temporarily reposed in the contractor, but the beneficial use of the facilities was devoted to the Government, and the Government could ultimately sell the property, the contractor having the first option to purchase. An immediate, *direct* expenditure of public funds financed the expansion where the facilities were to be governmentally owned or where the Emergency Plant Facilities Contract was employed. Where the construction of the facilities was financed by private funds, the granting of rapid amortization had the effect of *indirect* government financing to the extent that a corresponding reduction in taxes was achieved during a period when a high tax rate was being imposed. See Senate Hearings before the Committee on Finance, 76th Cong., 3d Sess., Second Revenue Act of 1940, pp. 166–186; S. Rep. No. 2114, 76th Cong., 3d Sess., pp. 8–9 (1940–2 Cum. Bull. 528, 534).

2. *The administration of the amortization provisions.*—Although the amortization provisions were nominally a part of the revenue laws, the function of determining what facilities should be entitled to receive the benefits of the statute was delegated to the executive officials primarily responsible for controlling the development of the defense program, presumably on the theory that they were best able to weigh the necessity of particular facilities in the light of all surrounding circumstances, including the cost to the Government resulting from certification. From 1940 to 1943, the certifying officers were the Secretaries of War and the Navy; in December, 1943, the certifying function was delegated to the Chairman of the War Production Board.

Determination of the extent to which facilities should be certified as necessary in the interest of national defense during the emergency period involved many difficult and complex problems. The certification program required decisions regarding facilities for producing a vast variety of products, not only ranging from such vital items as planes and tanks to such non-essential items as candy and pies for war-workers, but also including numerous intermediate items, such as products for housing and for banks, production of which, although not indispensable, might to some extent aid in the defense effort. Moreover, changing conditions, such as supply and demand with respect to a particular product and availability of other facilities to produce it, made certain plant facilities more desirable at one

time than at another. Furthermore, it was necessary not merely to weigh a particular facility's desirability in the abstract, but to consider the advantages and disadvantages of alternative methods of financing, such as direct Government ownership or utilization of Emergency Plant Facilities Contracts.

It is not necessary to elaborate in detail the many complex matters which the certifying authority was required to consider in passing on the numerous applications for certificates of necessity.[9] We do, however, emphasize the history of the administration of the statute as it relates to the well-defined policy regarding the issuance of partial certificates of necessity, such as were issued to the taxpayer in this case.

In the report to the Secretary of War on the administration of the amortization provisions, dated February 15, 1945, Under Secretary of War Patterson stated (Appendix B, pp. 36–37):

> By the spring of 1943 it was becoming apparent that the chief limiting factor in the production of war supplies no longer was facility capacity but materials and manpower. The use of steel and manpower to create factories, which could not then be fully used because of a lack of materials and workers, would do injury to the war effort. *The search for maxi-*

[9] During the period of the emergency, approximately 54,000 applications were filed, and approximately 41,000 certificates were issued covering facilities having an estimated cost of more than seven billion dollars. (Testimony of Byron D. Woodside, Director of the Business Expansion Office of the Defense Production Administration, 3 House Hearings, Committee on Ways and Means, 82d Cong., 1st Sess., Revenue Revision of 1951, p. 2667.)

> *mum war production now required, not an encouragement of facility expansion, but a curbing of it.* [Emphasis added.]

Accordingly, serious consideration was given to terminating the amortization privilege altogether. (Appendix B, *infra,* p. 37.) While this extreme step was not resorted to, it was decided to restrict substantially the issuance of necessity certificates. Thus, on October 8, 1943, a regulation was published by the Secretaries of War and the Navy, with the approval of the President (8 Fed. Register 13824; Appendix A, *infra,* p. 72), providing that thereafter no new necessity certificates would be issued unless—

> the Secretary of War or the Secretary of the Navy, in exceptional cases, has determined prior to the beginning of such construction, reconstruction, erection, installation, or the date of such acquisition, that there is a shortage of facilities for a supply required for military or naval uses and *that it is to the advantage of the Government that additional facilities for such supply be privately financed.* [Emphasis added.]

On December 17, 1943, the President, by Executive Order, transferred the certifying function to the Chairman of the War Production Board, and the foregoing regulation was continued by the War Production Board. (Executive Order 9406, 8 Fed. Register 16955, and Regulations issued pursuant thereto, 8 Fed. Register 16964; Appendix A, *infra,* pp. 62–68, 76.) In line with this general policy of limiting further certifications to the absolute minimum, the War Pro-

duction Board also promulgated the partial certification policy.[10] As stated by Byron D. Woodside, Director of the Business Expansion Office of the Defense Production Administration (3 House Hearings before Committee on Ways and Means, 82d Cong., 1st Sess., Revenue Revision of 1951, p. 2667):

> That change in policy occurred at the time that the War Production Board was attempting to curtail the expansion of industry, particularly in certain areas, when we were interested in encouraging expansion in very limited areas, so that the 35-percent certification at that time represented a policy of holding down expansion of the economy toward the closing phases of the last war.

The details of that policy are fully set forth in an affidavit of Mr. Thomas, who was charged with its administration, and which is set forth in separately bound Appendix B, pp. 1–53.[11] In essence, this policy

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[10] While most of the certificates issued by the War and Navy Departments were issued in the expansion period, and hence were 100% certificates, it is noteworthy, as indicated in the Patterson report, that even those agencies occasionally issued less than 100% certificates. (Appendix B, p. 36.) See also the testimony of Byron D. Woodside, cited in footnote 9, *supra*.

[11] It was alleged and admitted that the language contained in the three necessity certificates involved in this case was almost identical to the language contained in the certificates of necessity issued to the taxpayer in the case of *Wickes Corp.* v. *United States*, 108 F. Supp. 616 (C. Cls.), upon which case the court below relied in granting taxpayer's motion for summary judgment. (R. 8, 11.) Accordingly, we have included in Appendix B to this brief an excerpt from the record in the *Wickes* case, consisting of an affidavit of Sidney T. Thomas,

was based on the premise, explicitly stated in the regulations, that facilities were to be certified only if it was clearly in the Government's interest that they be privately financed. Hence, since any facility with clear post-war value could, if Government-financed, be readily disposed of at the end of the war, and since it was believed that, for the most part, sufficient plant capacity had already been achieved, it was concluded that, consistent with the criterion laid down in the regulations, only facilities having no post-war use would thereafter be given 100% certificates. All other facilities would, where appropriate, be certified only to the extent of the war-induced cost. Subject to variation in special cases, it was determined that in the normal situation the part of the cost due to abnormal wartime prices was 35%.

Pertinent extracts from instructions issued by the War Production Board indicate the reasons for the issuance of partial certificates (Appendix B, pp. 45–46):

> The Government's substantial monetary interest in facilities covered by a Necessity Cer-

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Acting Chief of the Tax Amortization Branch of the War Production Board, explaining the policy of the certifying agency in issuing certificates for less than full cost.

This affidavit is part of the record in the case of *National Lead Co.* v. *Commissioner*, No. 124, present term, pp. 9–52, in which the identical issue is involved.

See also Mr. Thomas' testimony to the same effect, Hearings before the Special Senate Committee Investigating the National Defense Program, 80th Cong., Part 42, pp. 25553–25558. And see Civilian Production Administration, I *Industrial Mobilization for War—History of the War Production Board and Predecessor Agencies* (1940–1945), p. 657.

tificate must be recognized. Amortization represents an abnormal tax deduction and hence a loss of revenue to the Government. In the case of companies in the higher tax brackets, this may amount to 81 percent of the cost of the facilities.

* * * * *

In determining whether it is to the advantage of the Government that the facilities be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market may be assumed to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, *if a facility appears to be of such a type that it would have a reasonably wide market after the war,* it may generally be assumed that, provided the DPC or other government agency is willing to purchase it, *it would be to the advantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a percentage certificate were issued, such percentage being based, for example, on excess cost attributable to the war.* [Emphasis added.]

These instructions provided that one of three recommendations was to be made respecting each application, *viz.*, that no certificate should be issued, that a

100% certificate should be issued, or (Appendix B, p. 50)—

> That the facilities should be partially certified (state specific percentage recommended).

The instructions also stated (Appendix B, p. 50):

> 1. One hundred percent certificate will be given only when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use, and it is not reasonable to assume that they may be useful after the war.
>
> 2. Partial certificate representing excess construction or acquisition costs over pre-war costs* will be given when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use and it is reasonable to assume that they may be useful after the war.

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*It is impossible to predict whether post-war costs will be above or below present costs, yet it appears equitable to relate them to pre-war costs. Accordingly, prewar costs are to be used in determining this partial certificate, and as a general rule pre-war costs are to be considered as being those in effect during the years 1937–1939, inclusive.

Partial certificates were also to be issued where, for example, the productive capacity of the facility was in excess of that necessary for the war effort. Thus, the instructions stated (Appendix B, p. 51):

> When the facility is clearly necessary to the war effort, but its capacity or cost is in excess of that which is necessary for the war effort, the percentage should be determined in such a way as to make no amortization allowance applicable to the excess capacity or cost.

B. *Section 124 of the Internal Revenue Code authorized the issuance of partial certificates of necessity*

We turn now to a more detailed examination of the relevant statutory provisions to show why the issuance of partial certificates of necessity, such as were issued to the taxpayer in this case, was entirely within the authority granted by Congress.

Code Section 23 (t) permits, in the computation of net income, a deduction for amortization as provided in Section 124. Section 124 (a) permits a deduction with respect to the amortization "of the adjusted basis" of "any emergency facility" based on a period of sixty months; the sixty-month period for amortizing the property could, on the earlier termination of the emergency period, as proclaimed by the President, be foreshortened, thus permitting larger deductions over a shorter period. Code Section 124 (d). An "emergency facility" is defined in Section 124 (e) (1) as "any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made."

Section 124 (f) provides:

> *Determination of Adjusted Basis of Emergency Facility.*—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—
>
> (1) There shall be included *only so much of the amount* otherwise constituting such adjusted basis *as is properly attributable to such*

> *construction,* reconstruction, erection, installation or acquisition after December 31, 1939, *as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense* during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President. [Emphasis added.]
>
> * * * * *

It is our position that Congress intended to and did grant the widest discretion to the administrative officials in making their determination of what should be certified as "necessary in the interest of national defense". As we have seen, the constantly shifting problems of production called for delicate and difficult judgments regarding the type of facilities which were to be encouraged at any particular time by the granting of certificates of necessity. (See *supra,* pp. 19–20, Appendix B, *infra,* pp. 14–15.) Whether certificates would be issued for one type of facility rather than another, whether one applicant should be issued a certificate rather than another, were decisions which Congress left to the sole discretion of the certifying authority, once the underlying, complex factors had been weighed and an ultimate determination had been made concerning what was "necessary in the interest of national defense". And, we maintain, that in leaving to the certifying agencies the difficult problem of weighing the cost to the Government of full certification, and of ascertaining what alternatives

were available Congress did not say that these agencies should be precluded from determining that only a part of the cost of a defense facility was "necessary in the interest of national defense".

The financing of the war effort, in part, by severe increases in the public debt, the effect of this, in conjunction with the tremendous demand for articles in short supply, in producing a rising spiral of prices (which the Government was endeavoring to control in a variety of ways, including very high tax rates), and the threat which an uncontrolled inflation constantly presented to the nation's ability to conduct a successful war effort—Congress was doubtless aware that all these were pressing problems inextricably interlaced with one another. The obtaining of needed war materials from new plant capacity was an inseparable aspect of the program; and it could not be done without taking into account the effect which particular forms of financing would have on all other forces at work in the economy. Consequently, it would be inevitable that a judgment concerning the "necessity" of particular plant facilities could only be reached after considering the relative advantages or disadvantages of (a) private financing under a 100% certificate, with an attendant loss of large revenue,[12] (b) Government financing, with an immediate

[12] The possible loss of revenue in the case of a facility having full post-emergency utility may be illustrated by the following hypothetical example:

> Assume that the adjusted basis of such facility for either amortization or depreciation is $1,000,000; that it has a useful life of twenty years; and that the corporate tax-

expenditure of public funds, or (c) between these extremes, private financing under a partial certificate with a smaller loss of revenue. Congress knew, only too well, of the many forces which had to be controlled to avoid economic disaster and could scarcely have intended to require that determinations of necessity be made on an abstract, mechanical "100% or nothing" basis. It is not reasonable to assume, in the absence of express language to the contrary, that Congress, under the circumstances, deliberately withheld from the certifying officials the authority to decide, on the basis of all relevant considerations, that a part, but not all, of the cost of a particular plant was necessary for the national defense, and that a certificate of necessity should be issued for only that part of the cost. On the contrary, we think the statutory provisions quoted above amply empowered the agencies to exercise such a judgment.

1. *The Graphite and Wickes cases.*—The question whether the statutory grant of authority was broad

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payer's annual income from other sources and from the facility is sufficient to bring the latter income within an 85% tax bracket (including excess profits taxes) during a five year emergency period, and within a 25% tax bracket within the remaining 15 years. Applying the amortization deduction provisions would result in a reduction of taxes by 85% percent of $200,000 each year for five years, a total of $850,000. Application of depreciation allowances over the longer period of twenty years would result in a reduction of taxes by 85% of $50,000 for each of five years and by 25% of $50,000 for each of the remaining fifteen years, a total of $400,000. Accordingly, the loss of revenue under the amortization deduction provision would be $450,000.

enough to permit the discretionary issuance of partial certificates was litigated in *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944 (D. C. D. C.), affirmed *per curiam* (Judge Miller dissenting), *sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, certiorari denied, 339 U. S. 904.[13] There, an applicant to whom a partial certificate had been issued sought a writ of mandamus to compel the issuance of a 100% certificate on the ground that, once it was determined that the facility was necessary in the interest of the national defense, the statute made it obligatory to issue a 100% certificate and granted no discretion to certify only part of the cost. Judge Pine's opinion, on the basis of which the Court of Appeals affirmed, *per curiam*, concluded that the statute granted a wide discretion to the administrative officials (p. 946) "in view of the clear purpose of Congress to provide flexibility in administration to meet changing conditions and circumstances in the prosecution of the defense program". And, in concluding that there had been no abuse of that discretion in the issuance of such certificates, Judge Pine stated (p. 946):

> Here the certification was made pursuant to an established policy of the War Production Board which, after December 17, 1943, was

[13] It may be noted that Judge Clark, of the Court of Appeals for the District of Columbia Circuit, who joined in the *per curiam* affirmance in the *Graphite* case, was a member of the Senate Finance Committee in 1940 when that committee considered the legislation which was enacted as Section 124 of the Internal Revenue Code of 1939.

> vested with the functions of the Secretary of War and the Secretary of the Navy, Executive Order No. 9406. This policy limited amortization to excess war cost (estimated at 35%) in the case of facilities having presumptive postwar utility, which was found by the Board to be true of the facilities here involved. This would appear to be in furtherance of the legislative purpose to encourage capital investment in the defense effort which would not be available because of fear that such investment would have no postwar value, and at the same time maintain the amortization benefits under such control that they would not unduly injure the revenue.

(The full text of the opinions in the *Graphite* case is contained in Appendix B, pp. 53–69.)

Later, however, the Court of Claims, in a tax refund suit by the corporate successor of the United States Graphite Company, took an opposite view of the statute. *Wickes Corp.* v. *United States,* 108 F. Supp. 616. Chief Judge Jones dissented in that case as well as in the present case. Since the decision of the Court of Claims in the present case is based on the reasoning of its decision in *Wickes,* the opinion in that case (which is reproduced in Appendix B, pp. 69–80) warrants comment.

The view of the Court of Claims, which relies heavily on the reasoning of Judge Miller's dissent in the *Graphite* case, rests on the following proposition: Section 124 (f) contemplates, in the case of a facility acquired after December 31, 1939, that a certificate will be issued for 100% of its cost if the

facility is found to be necessary in the interest of the national defense, or that no certificate will be issued if the facility is not found necessary in the interest of the national defense; the language of Section 124, limiting the adjusted basis to "only so much of the amount" of its cost, applies only to a facility which was partially completed after December 31, 1939, and requires, if the facility is found to be necessary, a certification of the full cost of the part completed after that date.

Even if the literal words of Section 124 (f) furnished the sole guide to the ultimate decision and if other aids to construction could be disregarded, we believe that the Court of Claims misread the statute. The court below, as did Judge Miller in his dissenting opinion in the *Graphite* case, construed Section 124 (f) as though the statute had given the administrative officials authority to certify "only so much of" the amount of the basis of the property (which, as here, is normally cost) only where a part of the property was constructed or acquired before December 31, 1939, and as if the "only so much of" phrase performed no other function than to restrict certification to the costs incurred after that date. But such a reading of the statute ignores the nexus between the "only so much of" phrase and the language reading "as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense". Reading these as related phrases does not ignore the intervening phrase "as is properly attributable to such construction [etc.] * * *

after December 31, 1939," for the introductory "only so much of" clause is connected, both in context and in meaning, with each of the ensuing phrases. In other words, the adjusted basis of the facility on which the amortization deductions are to be computed, is limited not only to "so much of" the amount of the basis which is attributable to construction after December 31, 1939, but also to "so much of" the cost basis "as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense."

The interpretation of the statute adopted by the Court of Claims would, quite plainly, lead to absurd results. Several examples will suffice.

Suppose that an application was filed in 1943 to construct a proposed plant at an estimated cost of one million dollars. The War Production Board determines that the plant is necessary in its entirety, that it is peculiarly designed to produce materials which would be useful only during the emergency period, and issues a certificate of necessity for 100% of cost, limited to one million dollars, as described in the application. Suppose further that the plant is constructed precisely as described in the application but at an actual cost of two million dollars. If the Court of Claims is correct, since the entire construction took place after December 31, 1939, the War Production Board's only authority would be to certify whether the construction was in the interest of the national defense, and it would have no authority to limit the amount of cost which would become the basis

for the amortization deduction. In other words, the Government would never have any assurance, once a certificate was issued, of what costs would become deductible through amortization.

Suppose, also, a situation where, on the face of the application, it is clear that an indivisible portion of the plant will be useful for non-essential civilian production and that only the remaining indivisible portion will be useful for essential war production. If the Court of Claims is correct, no statutory provision would exist which would enable the War Production Board to issue a certificate limited to the portion of the cost of the emergency facility which is deemed necessary, so that only that portion of the cost could be amortized, the remaining portion of the cost being deducted at ordinary depreciation rates.[14] Under the statute, as construed by the Court of Claims, either a certificate would have to be issued for all the cost or else a certificate would have to be denied.

The question naturally arises—why would Congress have imposed such unrealistic restrictions on the certifying agencies? How could it have anticipated a sensible administration of the program if it had intended to confine certifications to an all-or-nothing standard? Congress could scarcely have desired that certificates of necessity should represent blank checks,

[14] The administrators had taken an opposite view of their authority from the very beginning. The report of the Under Secretary of War states (Appendix B, p. 36): "In an early case, a building had been erected to produce 70% peacetime products and 30% war products. A 30% certificate was granted."

with the taxpayer entitled to amortize full costs of construction, no matter how much they exceeded the prior estimates contained in the application for the certificate. And where the proposed facility was designed to produce, in part, items of absolute necessity to the nation's defense and, in part, unnecessary civilian items, it is difficult to believe that Congress desired either that the entire cost of the plant should be certified or that no certificate should be issued, with the consequence that the necessary part of the production might be unavailable from privately owned plants.

In short, we believe that Congress intended to give the agency broad discretion adequate to the proper exercise of its functions[15] (cf. *Sec'y of Agriculture* v. *United States,* 347 U. S. 645, 652; *Virginia Electric Co.* v. *Board,* 319 U. S. 533, 539; *Federal Comm'n* v.

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[15] The mood of Congress at that time is reflected in the following colloquy between Congressman McCormack of Massachusetts and Secretary of War Stimson (Joint Hearings, *supra*, p. 27):

> Mr. McCormack. There is just one more question, Mr. Secretary: In the enactment of legislation, whatever it might be, whether it comes from this committee or any other committee, when it is enacted into law, particularly in this emergency, do you not think that the Congress should give to those administering the legislation, which is so vital to the national-defense program, that is, that the legislation should be as broad and as flexible administratively as is possible to meet the existing problems that will arise, and cannot be otherwise handled in an emergency.
>
> Secretary Stimson. You raise in that a question of constitutional government, and particularly of democratic con-

Broadcasting Co., 309 U. S. 134, 138), and that it understood that what was necessary to the national defense did not always permit "yes" or "no" answers. In many situations, the answer would be "partly". Where only part of the plant was to be used for the immediate production of war products, only part of its cost was necessary. Similarly, where only part of the useful life of the plant would be used for the production of war products, because it would be useful after the emergency for civilian purposes, only part of the cost was necessary so that only that part would be entitled to rapid amortization, the balance being subject to normal depreciation deductions.

Even if, as Judge Miller stated in his *Graphite* dissent (176 F. 2d 868, 870), "Congress did a poor job of statute writing in framing subsection (f) (1)", that would scarcely be justification for resolving doubts in favor of a construction which would have seriously restricted the latitude of judgment to be exercised by those charged with a heavy responsibility in administering a complex program forming an integral part of the defense and war effort. Even under

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stitutional government, of long standing. It has many complexities and there is much to be said on it.

Mr. McCormack. The Congress can enact broad legislative standards, but in the standards the administrative power should be flexible.

Secretary Stimson. I was about to say that my opinion for many years has been that a government which is based upon the proposition that you cannot trust anyone does not get very far.

Judge Miller's view, the approach adopted by this Court in *United States* v. *Koppers Co.*, 348 U. S. 254, 261, would have been appropriate, where it was said:

> Congress could have prescribed either treatment but did not expressly specify either. Our answer is determined from our consideration of the statutory scheme as a whole, the related provisions of the statute, the legislative history of Section 722 and the administrative interpretation that has been given the statute.

The contemporaneous administrative construction of the statute shows an understanding of the legislation which is completely at variance with that of the court below. Immediately following the enactment of the Second Revenue Act of 1940, *supra*, T. D. 5016, 1940–2 Cum. Bull. 119, was promulgated which added appropriate sections to existing Treasury Regulations 103. Section 19.124–6, as added by T. D. 5016, explicitly demonstrated that the adjusted basis for the amortization deduction would not only be limited to the portion of the basis attributable to construction after June 10, 1940 (the date then specified in the statute and later amended to December 31, 1939) but would be further limited if the appropriate officials "certif[y] only a portion of the construction [etc.] * * * after June 10, 1940". Two examples given in the Regulations made it crystal clear that such a dual limitation existed and that, even as to post-June 10, 1940, costs, only a portion might be certified and that only that portion would represent the basis of the property on which the amortization deduction could

be computed."[16] And, as we have seen, it was the practice of the certifying agencies, from an early date, to issue such percentage certificates. (See footnote 10, *supra*, p. 22.)

This publicly announced interpretation of the statute in the Treasury Regulations is not only entitled to great deference as a contemporaneous administrative construction (*Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501; *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 101–103; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315) but assumes even greater significance in view of the fact that the statute was subsequently amended by five separate enactments,[17] without the slightest indication that Congress disapproved the initial administrative interpretation.

That Congress intended to confer a wide latitude of administrative discretion is confirmed by the enactment of the Joint Resolution of October 30, 1941, c. 464, 55 Stat. 757, requiring the President's approval of prescribed regulations in accordance with which certificates of necessity were to be issued by the Secre-

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[16] Although the Regulations were amended, from time to time, to conform to other statutory changes, the essential portions indicating the policy of partial certification was continued. See Treasury Regulations 111, Section 29.124–6, Appendix A, *infra*, pp. 77–79, and the example of a certificate limited to 50% of post-December 31, 1939, costs.

[17] Section 124, Internal Revenue Code of 1939, as added by the Second Revenue Act of 1940, *supra*, was amended by the Joint Resolution of January 31, 1941, c. 3, 55 Stat. 4; the Joint Resolution of October 30, 1941, c. 464, 55 Stat. 757; the Joint Resolution of February 6, 1942, c. 41, 56 Stat. 50; Section 155, Revenue Act of 1942, c. 619, 56 Stat. 798; Section 7 of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517.

tary of War and the Secretary of the Navy. Thus, as stated on the floor of the House by Congressman Treadway, a member of the committee in charge of the bill (87 Cong. Record, Part 8, p. 8092):

> I would like to make this statement: The gentleman from Ohio is worried for fear the Secretary of War and the Secretary of the Navy may have undue influence over the finances of the country. However, there is a provision in the amendment, as recommended in this report, which states that the certification shall be under such regulations as may be prescribed by them "with the approval of the President." In other words, the President has ultimate control; which seems to cover the point that the gentleman from Ohio [Mr. Jenkins] makes. I think the gentleman will concede that that is a very evident result of the authority provided in the resolution, whereby the President of the United States, in addition to the Secretary of War and the Secretary of the Navy, has a hand in formulating the rules and regulations which must be followed in the issuance of the amortization certificates.

And again, as stated by Chairman Doughton (87 Cong. Record, Part 8, p. 8094):

> The authority is given to the President, and the President has the responsibility. He can call in for consultation whom he wishes; he can keep watch over it at every step of the proceedings.

Pursuant to this requirement, regulations prescribed by the Secretary of War and the Secretary of the Navy, with the approval of the President, govern-

ing the issuance of necessity certificates under Section 124 (f) of the Internal Revenue Code, Appendix A, *infra*, pp. 68–73, were published in 7 Fed. Register 4233, on June 4, 1942. Section 5 of those regulations states:

> 5. *Effect of Necessity Certificate.*
>
> a. *General rule.* A Necessity Certificate is conclusive evidence of certification by the certifying authority that the facilities therein described are necessary in the interest of national defense, up to the percentage therein designated of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof after June 10, 1940.[18]

This express recognition that the statute entrusted authority to certify only a percentage of the cost attributable to construction after the critical date, stated in regulations which received the express approval of the President and which were never disavowed or even questioned by Congress, is further confirmation of our contentions. And we may note, at this juncture, that the certificates involved in this case follow the exact language of the regulations, except that the precise percentage of cost is stated in the certificates.

The Court of Claims, without referring to all these materials, assumed that the legislative history compelled its conclusion that the statute restricted certificates to an all-or-nothing basis. Its citation of pages 124 and 125 of the Senate Hearings (*supra*) presumably had reference to the following colloquy between

[18] In conformity with a subsequent amendment of the statute, this date was later changed to December 31, 1939.

Assistant Secretary of the Navy Sullivan, and Senator George:

> Senator GEORGE. Is the certificate that is issued on the recommendation of the National Council and the Secretary of War or Navy, as the case may be, limited to mere certification that the particular facility is necessary for defense, or do they go further and specify what the depreciation and obsolescence amounts to?
>
> Mr. SULLIVAN. No; they do not.
>
> Senator GEORGE. They turn that back to the Treasury?
>
> Mr. SULLIVAN. No, sir; under the bill automatically the amortization to which they are entitled is 20 percent a year, for 5 years.

This explanation, quite plainly, had nothing to do with the power to issue a certificate covering only a portion of the cost of a facility where only part of the cost was necessary to the national defense; it merely states that where a certificate has been issued, the certifying authority does not calculate the amount of the deduction since the statute automatically determined the period during which the amortization deductions would be spread. Furthermore, since the precise tax basis of the property, which would usually be its cost, would not necessarily be known when the certificate would be issued (although the upper limit would be stated), it would have been impossible for the certifying authority to have exercised the function of specifying the amount of the deduction.

Mr. Sullivan also stated (Senate Hearings, *supra*, p. 125):

> Under this law, it may be prudent, it may be the wise thing to do; but I couldn't say to this committee that it is reasonable to expect that an ultra-modern factory that is to be constructed in the latter part of 1940 or the first part of 1941, built with all of the latest skill and engineering experience, is going to be absolutely useless in 1946. I don't think that is "reasonable," and yet I believe it is desirable and prudent to grant this amortization to those companies that are putting up new facilities for this picture.

Here, as is true of other similar statements relied on by this and other taxpayers in the lower courts, the authority is assumed, and unquestionably it existed, to issue certificates for 100% of costs even though a possible post-war use existed.[19] Undoubtedly, particularly during the earlier stages of the defense effort and the war period, the possible post-war utility of a facility could be so remote and con-

[19] Some of the principal witnesses before the committees, and indeed one of the committees itself, indicated that a basic assumption was that the certified facilities would have little or no post-war value. Several quotations, previously set forth, are pertinent and may be repeated. Thus, Secretary Stimson, testifying in favor of the proposed legislation, stated (Joint Hearings, *supra*, p. 23):

> Risks are inherent in any business enterprise. Industry may be expected to undertake normal risks. But the risk to industry of undertaking at the request of the Government to expand plant capacity at industry's own expense *and of then being left, upon a sudden cessation of the emergency, with these expanded facilities useless*, is one

tingent as to play but a minor factor in the administrative judgment, where all elements had to be weighed, and sound discretion could decide that 100% of cost should be certified in order to induce the private financing of urgently needed plant capacity. But the power to issue a 100% certificate by no means negates the existence of authority to certify a lesser percentage where, as was true in the later period, there was no longer an urgent necessity for rapid expansion and where post-war utility to the taxpayer and other factors, such as the relative cost to the

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that is entitled, in my opinion, to special consideration. [Emphasis added.]

And Assistant Secretary of the Treasury Sullivan testified to the same effect (p. 75):

> *In those cases in which the plant and equipment will have little or no other use after the completion of the defense program*, the [normal] rate of depreciation must be increased if the manufacturer is to have the opportunity of charging the cost against income during the period of the emergency. [Emphasis added.]

Finally the House Ways and Means Committee in reporting out the bill stated the bill was needed "in view of the fact that such [emergency] facilities will be of use chiefly only during the period of national emergency." H. Rep. No. 2894, 76th Cong., 3d Sess., p. 16 (1940-2 Cum. Bull. 496, 508). See also to the same effect the remarks of Congressman Boehne of Indiana at 86 Cong. Record, Part 10, p. 11240; of Chairman Doughton of the House Ways and Means Committee, p. 11243; and of Congressman Treadway of Massachusetts, p. 11245.

It is thus evident that there were authoritative statements to the effect that the general assumption was that the emergency facilities would have little or no post-war value. This is scarcely surprising since the statutory scheme was formulated at a time when no one could venture any sound prediction concerning the number of years that would elapse before the emergency would terminate.

Government, assumed new and more clearly discernible weight in the ultimate judgment. A decision that, in view of all existing circumstances, only a portion of the cost should be certified as necessary in the interest of the national defense, was, we submit, plainly authorized by statute where it was administratively found to be most appropriate to effectuate the overall legislative policy.[20]

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[20] Although the Court of Claims made no express reference to this, Judge Miller's dissent in the *Graphite* case alluded to the amortization problems which existed under the World War I statute; he concluded that Congress desired to eliminate troublesome post-war use problems arising out of the earlier legislation and could not have intended to permit the issuance of partial certificates which had taken post-war use into account.

Judge Miller was undoubtedly correct when he stated that Congress, in enacting Section 124, wanted to avoid the problems encountered under the World War I amortization law. But he was not wholly accurate when he implied that the principal problem there encountered was that of taking into account the post-war value of facilities. Rather the problem was that the 1918 statute, while based on a loss of useful value, did not prescribe the amount to be amortized in advance, and therefore great uncertainty prevailed and occasionally protracted litigation ensued over the post-emergency value of facilities. However, it is generally agreed that this problem was avoided in the World War II statute by fixing an arbitrary maximum period during which the certified costs could be fully amortized. (See, e. g., 4 Mertens, *Law of Federal Income Taxation*, Sec. 23.124 *et seq.;* see also Machinery and Allied Products Institute, *Amortization of Defense Facilities* 22–28 (1952). See also the memorandum submitted by the Chief of the Bureau of Internal Revenue's Amortization Section during World War I, reproduced at Joint Hearings, *supra*, pp. 228–230; and H. Rep. No. 504, 82d Cong., 1st Sess., pp. 16–17.) That, it is submitted, is the sole import of the colloquy between Senator George and Assistant Secretary Sullivan

Nor does the post-legislative history of Section 124 support the conclusion that the Executive did not have discretion under that section to issue percentage certificates. In 1950, as a result of the Korean War, new amortization deduction provisions with respect to that conflict—Section 124A of the Internal Revenue Code of 1939 (Appendix A, *infra,* pp. 61–62) (carried over as Section 168 of the 1954 Code)—were enacted. Section 124A (e) (1)—the subsection corresponding to Section 124 (f) (1) of the World War II legislation—contains a specific proviso designed to make explicit the certifying agency's power to issue percentage certificates for less than full cost.[21] The reason for this addition was stated as follows by the Senate Finance Committee, which inserted the amortization provision into the Revenue Act of 1950

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quoted in Judge Miller's dissent and discussed *supra*, p. 29. In other words, Assistant Secretary Sullivan made clear to Senator George that under the proposed law, unlike under the World War I statute, the taxpayer knew in advance just what standards would govern his amortization deductions, i. e., at least 20% of the certified amount for each of five years.

We note, in this connection, that when Congress enacted the amortization provisions during the Korean conflict and inserted an explicit provision to make it clear that partial certificates could be issued (see pp. 45–47, *infra*), there was not the slightest indication that it was thereby resurrecting the troublesome World War I problems which Judge Miller thought would necessarily attend partial certifications.

[21] The proviso reads: "and only such portion of such amount as such authority has certified as attributable to defense purposes [shall be included in the adjusted basis of the emergency facility]."

(S. Rep. No. 2375, 81st Cong., 2d Sess., p. 59 (1950–2 Cum. Bull. 483, 526):

> The bill provides that a portion of the facility may be designated as essential. There was no similar provision under the World War II legislation but certificates limiting amortization to a percentage of the total cost of a facility were issued in the closing months of the war.

And Senator George, the Chairman of the Senate Finance Committee, stated on the floor (96 Cong. Record, Part 10, p. 13276):

> While percentage certification of this type was in fact used during the closing months of World War II, it was not *specifically* provided for by the legislation of that period. [Emphasis added.]

Accordingly, it would appear that, if the post-legislative history proves anything, it indicates that Congress was only making explicit in the Korean War legislation what was implicit in the World War II legislation.[22] Certainly the addition of a clause specifically authorizing certification of less than full cost during the Korean War period cannot be taken as evidence of an intent to "change" the law with respect to the

[22] When Mr. Thomas, Chief of the Tax Amortization Section of the War Production Board, appeared before the Special Senate Committee investigating the National Defense Program, he specifically suggested that "it [the power to issue percentage certificates] should be spelled out in the statute" so as to give clear notice of the administrative authority to prospective applicants. See Hearings Before the Special Senate Committee Investigating the National Defense Program, 80th Cong., Part 42, p. 25,557.

World War II period,[23] for the Senate Committee explicitly stated in its report (S. Rep. No. 2375, *supra*, p. 94 (1950–2 Cum. Bull. 483, 550)):

> This section of the bill [adding the amortization provisions], for which there is no corresponding provision in the House bill has the same basic objectives as section 124 of the Code (relating to the amortization of emergency facilities during World War II) but is different therefrom in several important respects, *and it is not intended in any way to affect the law, or its administration, under that section.* [Emphasis added.][24]

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[23] This Court has frequently stated that the mere fact that a provision not present in the prior law is inserted into a subsequent act does not necessarily mean that the law was changed. See, e. g., *Higgins* v. *Smith*, 308 U. S. 473, 479–480; *Commissioner* v. *Wheeler*, 324 U. S. 542.

[24] While the addition of the clarifying proviso can accordingly be of no possible aid to the taxpayer here, there are several statements in other congressional reports examining the World War II amortization program which clearly reflect congressional endorsement of the percentage certification practice. Thus, in S. Rep. No. 440, Part 2, 80th Cong., 2d Sess., p. 11, the Special Senate Committee investigating the National Defense Program approvingly referred to the War Production Board's consistent adherence to this practice, while pointing out that the evidence indicated that the War and Navy Departments could have saved up to $3,000,000,000 if they had followed a similar course. Surely, if Congress, like the Court of Claims, had been so clear that the statute did not authorize percentage certifications, this Senate Committee would not have scored the War and Navy Departments for failing consistently to follow the War Production Board's practice, but would instead have criticized the War Production Board itself for its *ultra vires* acts. Moreover, in H. Rep. No. 504, 82d Cong., 1st Sess., p. 17, the Committee on Expenditures in the Executive Branch, in the course of examining

C. *In any event, the validity of the partial certificates issued to the taxpayer could not be attacked collaterally in a tax refund suit brought many years later, and the Court of Claims erred in entering a judgment for refund of taxes just as though the taxpayer had received 100% certificates*

So far we have tried to show that the certifying agency had the authority under the statute to issue the partial certifications which it gave to this taxpayer. For the remainder of this brief, however, we shall assume, *arguendo,* that no such authority was granted by the statute and shall address ourselves to the questions (a) whether the taxpayer could raise this issue by way of a collateral attack in a tax refund suit, and (b), whether the Court of Claims had the power itself to authorize the amortization of the full cost of the facilities even though the certifying agency had refused to do so.

A person who claims to be aggrieved by administrative action of the kind here in issue cannot simply sit back, and then, years later, question the validity of the administrative determination in a collateral proceeding before a tribunal which has no jurisdiction to review the discretionary powers of the administrative agency. *Callanan Road Co.* v. *United States,* 345 U. S. 507. Cf. *Commonwealth* v. *McCarthy,* 225

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the entire background of the various amortization programs, stated:

> This method [introduced by the Revenue Act of 1940] involves the grant of permission to a taxpayer under a certificate of necessity to amortize for tax purposes *the whole or some part of the* cost of an emergency facility over a 5-year period rather than over the much longer period applicable to facilities constructed or acquired in normal times. [Emphasis added.]

Mass. 192. 114 N. E. 287. And although the statute here involved did not explicitly provide for a method of reviewing the actions of the certifying agency, this would not have precluded the taxpayer from seeking judicial review of the allegedly unlawful denial to it of a 100% certificate. *Stark* v. *Wickard,* 321 U. S. 288, 309; *Board of Governors* v. *Agnew,* 329 U. S. 441, 444–445; *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177, 182–184. Indeed, the Court of Appeals for the District of Columbia Circuit in the *Graphite* case, *supra,* although not agreeing with the contention that the certifying agency lacked statutory authority to issue less than 100% certificates, did not deny its power to review, in an appropriate proceeding, the actions of that agency.

The insistence on orderly procedure by requiring an alleged victim of unlawful administrative action to seek direct review of that action is not an empty, meaningless requirement. It is a principle based on practical necessity. The present case is a dramatic illustration of why the recipient of a special privilege, granted as a consequence of administrative discretion, "cannot blow hot and cold" accepting the privilege as it was granted and later, in a collateral proceeding, "be heard to say that it is entitled to receive more." *Callanan Road Co.* v. *United States, supra,* p. 513.

Thus, when the taxpayer received Certificate WD–N–27705 certifying the facilities as necessary only up to 25% of their cost, it returned that certificate to the Secretary of War informing him that the limiting terms of the certificate were unacceptable to it and that

it was, accordingly, unwilling to proceed with the project for which it intended to use the facilities. As a consequence, an amended certificate, certifying the facilities as necessary up to 80% of their cost, was issued and the taxpayer acquired the described facilities at a cost of $1,014,930.34. (R. 5–6.) Subsequently, on March 20, 1945, over two weeks before Certificate NC–8542 was first issued, taxpayer was advised that its application was being approved for 35% certification rather than full certification as taxpayer had requested, inasmuch as the facilities were standard machine tools usable for a variety of peacetime activities and were not special tools usable only for specific war production. (R. 4.) Thereafter, without objecting to such certification, taxpayer requested that a revised list of machinery and equipment be included in its application. And, over a month after the certificate had been issued, taxpayer, again making no reference to the limited certification, sought and obtained the certifying agency's approval of an amendment of that certificate to cover facilities acquired between July 15, 1945, and August 30, 1945. (R. 4, 7, 11.) And, with respect to Certificate NC–263, which certified the facilities as being necessary up to 85% of their cost, the taxpayer also accepted the certificate and acquired the facilities without the slightest indication that the agency's action was unsatisfactory to it or that it would not acquire the facilities if the certificate was limited to only 85% of their cost. (R. 6–7.)

If the taxpayer, instead of accepting the certificates and constructing the facilities, had urged that there

was no statutory authority permitting the issuance of partial certificates and had brought a prompt, judicial proceeding to compel the certifying officials to exercise their discretion within the confines of the authority allegedly granted by Congress, and if the reviewing court had so held, namely, that the administrative judgment of necessity was an all-or-nothing matter, the situation would have been decidedly different. If the court in which relief was being sought had decided that there was no authority to certify only a part of the cost, it would still have recognized that there was a large area of administrative discretion which could be exercised, even in making an all-or-nothing judgment of necessity, which the court could not exercise and which could only be exercised by the administrators. Had timely judicial proceedings been instituted, "a prompt and proper exercise of the Board's discretion would still have been possible." *Commissioner* v. *National Lead Co.,* 230 F. 2d 161, 165 (C. A. 2).

This Court dealt with a similar situation in *F. P. C.* v. *Idaho Power Co.,* 344 U. S. 17. There the Federal Power Commission had issued a license, attaching what the Idaho Power Company claimed was an unlawful condition. On review to the Court of Appeals for the District of Columbia Circuit, that court agreed with the Idaho Power Company and ordered the license issued without the unlawful condition. However, this Court reversed, pointing out that it was for the Commission to decide whether it wanted to issue the license without the condition or whether it

did not want to issue the license at all. This Court stated (p. 21) that it is not for a reviewing court "to exercise an essentially administrative function," and again (p. 20), that the "function of the reviewing court ends when an error of law is laid bare." See also *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194; *Federal Comm'n* v. *Pottsville Broadcasting Co.,* 309 U. S. 134.

The impropriety, indeed the impossibility, of reviewing the regularity of these certificates as a collateral matter in a tax refund suit is not removed by concluding, as the Court of Claims did, that the facilities have already been certified as necessary so that, by disregarding the percentage limitations, the court can grant full amortization just as though 100% certificates had been issued. The certificates did not and were not intended to certify that the facilities were "necessary", considered apart from the percentage limitations—limitations which represented an inseparable element in the administrative judgment. The Court of Claims, in this collateral attack on the certificates, attempted to do what an equity court could not have done in a direct attack, namely, substitute its judgment for that of the administrative officials. Judge Lumbard, speaking for the Court of Appeals in the *National Lead* case, *supra* (p. 165), appropriately said:

> Since the Board [War Production Board] never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire

> cost. Neither that court nor any other court could make the determination of necessity entrusted to the Board. * * * It is now impossible for any court or administrative agency or official to make a proper determination of necessity based on the considerations relevant in 1944 when the certificate was issued. In any event no one can now summon up or accurately recall the relevant conditions which existed over ten years ago. Under these circumstances the taxpayer has forfeited his right to challenge the Board's action. * * *

In the *Wickes* case, however, the Court of Claims stated (p. 619; Appendix B, p. 75):

> We think that the Board's only function was to determine whether or not facilities answered the description of the statute, i. e., were they "necessary in the interest of national defense during the emergency period." Having so determined, any attempt by the Board to reduce the benefits which Congress granted to the person whose facilities answered the description, was in violation of the statute. The Government suggests that if the Board could not have limited its certificate to 35% of the costs of the facilities, it would, perhaps, not have certified them at all. We have no reason to suppose that the Board, when applied to by the plaintiff for a factual statement as to whether the plaintiff's facilities were, or were not "necessary in the interest of national defense during the emergency period," would have said to itself, "If we make a true statement, it will cost the Government X dollars in lost revenue. If it would cost the Government only Y dollars, we

would tell the truth. But since it will cost X dollars, we will not tell the truth.

However, a certification that facilities are necessary "up to 35%" of their cost, is not a certification that they are necessary up to 100% of their cost, or that, in an abstract sense, they are "necessary" in their entirety. As has been shown (*supra,* pp. 21–22), in 1943 it became the announced policy, in view of the existing favorable production situation, to curtail the amortization privileges drastically. The regulations (*supra*, p. 21), approved by the President, stated that, in addition to other factors, there must be taken into account whether "it is to the *advantage of the Government* that additional facilities for such supply *be privately financed.*" [25] [Emphasis added.]

The instructions issued by the War Production Board for the guidance of its personnel (see pp. 23–25, *supra*) specifically recognized the Government's financial stake in granting certificates of necessity and the possible financial advantage to the Government in public financing rather than in private financing under 100% certificates. As we have seen (*supra,* p. 25), the issuance of percentage certificates (either because part of the facility might be used immediately for non-essential uses or because the entire facility might soon be used for non-essential uses in view of the imminent termination of the war, or because of some combination of these circumstances) was a deliberate

[25] A press release issued simultaneously stated that the amended regulation "indicates virtual termination of the tax amortization privilege." See Appendix B, p. 6.

policy adopted to accommodate conflicting interests of the Government. The point is that the administrative determination, on the basis of which the certificates were issued, did not embody an absolute judgment of abstract necessity and, in making a relative judgment of necessity, the administrators did take into account and weigh the very factors which the Court of Claims thought were not encompassed within the certificates.

The argument accepted by the Court of Claims in this case was rejected by the Second Circuit in the *National Lead* case in these words (230 F. 2d at 164–165):

> The difficulty with this argument is that it assumes the determination of a facility's necessity to the national defense to be a black-or-white proposition ascertainable without reference to the cost to the Government. The determination whether a given facility was "necessary" was a policy question involving the weighing of many factors. Among these were the importance of the facility in the scheme of national defense and the cost of the facility to the Government in lost revenues. The certifying authority had to weigh importance against cost and determine whether that cost could best be expended there or elsewhere, and whether the desired facility could best be obtained through private financing with rapid amortization or through government financing. It is therefore evident that the partial certificates which the Board issued represented only a determination that the facility was necessary on the assumption that 35% or

50% rapid amortization would be allowed. If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same.

In sum, the situation in which the taxpayer has placed itself is this: The certificates which were issued to it do not, on their face, entitle the taxpayer to amortization deductions in excess of the percentages of cost of acquisition stated in the certificates. The taxpayer, of course, could not obtain from the Court of Claims an order directing the administrative officials to exercise their judgment in accordance with that court's view of the statute (namely, that necessity was an all-or-nothing proposition), for the Court of Claims possessed no jurisdiction to make such an order. The taxpayer's inability to secure in that forum the only remedy which would be appropriate for correction of an alleged error of law on the part of the certifying officials is, therefore, a cogent reason why the Court of Claims should not have undertaken to review this question.

Since the taxpayer did not seek timely and appropriate judicial aid to correct the alleged error, since it accepted the benefits conferred by the certificates,[26]

[26] In this connection, it should be noted that paragraph 3 (b) (v) of regulations published on December 21, 1943 (8 Fed. Register 16,964), Appendix A, *infra*, p. 76, provided that, with respect to any subsequent application for a necessity certificate, priority assistance would not be granted until a determination had been made upon issuance of such certificate. Issuance of Necessity Certificates NC–2631 and NC–8542, certifying part of the construction or acquisition cost of facilities included in taxpayer's

we submit that the Court of Claims, in determining the amortization deductions to which the taxpayer is entitled, was bound to accept the certificates, with their percentage limitations, as conclusive evidence of the tax basis on which the amortization deductions could be computed.

CONCLUSION

For the foregoing reasons the judgment of the Court of Claims should be reversed.

Respectfully submitted,

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SEPTEMBER 1956.

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subsequent applications, accordingly not only entitled taxpayer to accelerated amortization deductions with respect to such certified cost but also entitled the taxpayer to obtain priority assistance with respect to materials needed for such facilities.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(t) [as added by Sec. 301, Second Revenue Act of 1940, c. 757, 54 Stat. 974] *Amortization Deduction.*—The deduction for amortization provided in section 124.

(26 U. S. C., 1952 ed., Sec. 23.)

SEC. 124 [as added by Sec. 302, Second Revenue Act of 1940, *supra*]. AMORTIZATION DEDUCTION.

(a) [as amended by Sec. 155 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule.*—Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period. Such adjusted basis at the end of the month shall be computed without regard to the amortization deduction for such month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (g) of this section, be in lieu of the deduction with respect to such facility for such

month provided by section 23 (1), relating to exhaustion, wear and tear, and obsolescence. The sixty-month period shall begin as to any emergency facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

* * * * *

(d) *Termination of Amortization Period.*—(1) If the President has proclaimed the ending of the emergency period (as defined in subsection (e)), or if the Secretary of War or the Secretary of the Navy has, in accordance with regulations prescribed by the President, certified to the Commissioner that an emergency facility ceased, on the date specified in the certificate, to be necessary in the interest of national defense during the emergency period, and if the date of such proclamation or the date specified in such certificate occurs within sixty months from the beginning of the amortization period with respect to such emergency facility, then the taxpayer may elect (in accordance with paragraph (4) of this subsection) to terminate the amortization period with respect to such emergency facility as of the end of the month in which such proclamation was issued or in which occurred the date specified in such certificate, whichever is the earlier. In such case the amortization period with respect to such facility shall end with the end of such month in lieu of the end of the sixty-month period.

* * * * *

(e)[1] [as amended by Sec. 155 (d) of the Revenue Act of 1942, *supra*] *Definitions.*—

[1] As originally enacted, subsection (e) (1) provided:

(e) *Definitions.*—

(1) *Emergency facility.*—As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction,

(1) *Emergency facility.*—As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. For the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by any person after December 31, 1939, and not earlier than six months prior to the filing of an application for a certificate under subsection (f), and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility, notwithstanding that the other part of such facility was constructed, reconstructed, erected, or installed earlier than six months prior to the filing of such application. For the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by a corporation after December 31, 1939, and before June 11, 1940, and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility and to have been completed on June 10, 1940, notwithstanding that the entire facility was not completed until after June 10, 1940.

* * * * *

(f) [as amended by Sec. 155 (e) of the Revenue Act of 1942, *supra*] *Determination of Adjusted Basis of Emergency Facility.*—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

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reconstruction, erection, or installation of which was completed after June 10, 1940, or which was acquired after such date, and with respect to which a certificate under subsection (f) has been made.

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

* * * * *

(g) *Depreciation Deduction.*—If the adjusted basis of the emergency facility computed without regard to subsection (f) of this section is in excess of the adjusted basis computed under such subsection, the deduction provided by section 23 (l) shall, despite the provisions of subsection (a) of this section, be allowed with respect to such emergency facility as if its adjusted basis were an amount equal to the amount of such excess.

* * * * *

(26 U. S. C. 1952 ed., Sec. 124.)

SEC. 124A [As added by Sec. 216 (a) of the Revenue Act of 1950, c. 994, 64 Stat. 906]. AMORTIZATION DEDUCTION.

* * * * *

(e) *Determination of Adjusted Basis of Emergency Facility.*—In determining, for the purposes of subsection (a) or subsection (g), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount of the adjusted basis of such facility (computed without regard to this section) as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1949, as the certifying authority, designated by the Presi-

dent by Executive order, has certified as necessary in the interest of national defense during the emergency period, and only such portion of such amount as such authority has certified as attributable to defense purposes. Such certification shall be under such regulations as may be prescribed from time to time by such certifying authority with the approval of the President. An application for a certificate must be filed at such time and in such manner as may be prescribed by such certifying authority under such regulations but in no event shall such certificate have any effect unless an application therefor is filed before the expiration of six months after the beginning of such construction, reconstruction, erection, or installation or the date of such acquisition, or before the expiration of six months after the date of enactment of the Revenue Act of 1950, whichever is later.

* * * * *

(26 U. S. C. 1952 ed., Sec. 124A.)

Executive Order 9406, 8 Fed. Register 16955:

TRANSFER OF FUNCTIONS WITH RESPECT TO NECESSITY CERTIFICATES FROM THE SECRETARY OF WAR AND THE SECRETARY OF THE NAVY TO THE CHAIRMAN OF THE WAR PRODUCTION BOARD

By virtue of the authority vested in me by Title I of the First War Powers Act, 1941, and as President of the United States, and in order to enable the Chairman of the War Production Board more effectively to carry out his responsibilities with respect to the regulation of production and supply of materials, articles, and equipment, and services required for the national defense, it is hereby ordered as follows:

1. Subject to the provisions of section 2 of this order, the functions, powers, and duties of the Secretary of War and the Secretary of the

Navy with respect to the certification, pursuant to section 124 (f) of the Internal Revenue Code, of the construction, reconstruction, erection, installation or acquisition of facilities necessary in the interest of national defense during the emergency period, and with respect to prescribing from time to time with the approval of the President regulations governing such certification, are transferred to the Chairman of the War Production Board.

2. (a) The Secretary of War and the Secretary of the Navy shall act upon

(1) all applications for Necessity Certificates filed before October 5, 1943, and

(2) applications for Necessity Certificates led between and including October 5, 1943 and December 17, 1943 describing facilities the beginning of the construction, reconstruction, erection, installation or the date of acquisition of which was prior to October 5, 1943.

When the Secretary of War and the Secretary of the Navy have made final determination upon all applications specified in this subsection, their functions, powers and duties to issue Necessity Certificates shall cease.

(b) The Chairman of the War Production Board shall act upon

(1) applications for Necessity Certificates filed after December 17, 1943 describing facilities the beginning of the construction, reconstruction, erection, installation or the date of acquisition of which was prior to October 5, 1943. Such applications for Necessity Certificates filed after the effective date of this order shall be filed with the War Production Board.

(2) applications for Necessity Certificates filed on and after October 5, 1943 and pending December 17, 1943 with the Sec-

retary of War and the Secretary of the Navy which describe facilities the construction, reconstruction, erection or installation of which has not begun or which have not been acquired, and

(3) applications for Necessity Certificates filed after December 17, 1943, which describe facilities the construction, reconstruction, erection, or installation of which has not begun or which have not be acquired.

3. (a) The regulations of the Secretary of War and the Secretary of the Navy in effect prior to October 5, 1943 shall govern the issuance of Necessity Certificates for all applications for Necessity Certificates describing facilities the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of which was prior to October 5, 1943.

(b) In acting upon applications for Necessity Certificates filed on and after October 5, 1943 describing facilities the construction, reconstruction, erection or installation of which was not begun or which were not acquired prior to October 5, 1943, Necessity Certificates shall not be issued unless the Chairman of the War Production Board has determined prior to the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of the facilities (1) that the facilities to be constructed or acquired are clearly necessary for the war effort, and (2) that it is to the advantage of the Government that such additional facilities be privately financed.

4. In the exercise of the functions, powers and duties transferred by this order, the Chairman of the War Production Board may consult the War Department and the Navy Department with regard to facilities required primarily for military or naval use, and other

departments and agencies with regard to facilities required primarily for uses within their respective jurisdictions.

5. Such civilian personnel, property, and records used primarily in the administration of the functions, powers and duties transferred by this order, and so much of the unexpended balance of appropriations, allocations and funds available to the War Department and the Navy Department for the said purposes as the Director of the Bureau of the Budget shall determine, shall be transferred to the Chairman of the War Production Board on such date or dates as the Director of the Bureau of the Budget shall determine, for use in connection with the exercise of the functions, powers and duties so transferred.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE, *December 17, 1943.*

Executive Order 9429, 9 Fed. Register 2487:

AMENDING EXECUTIVE ORDER 9406 OF DECEMBER 17, 1943

By virtue of the authority vested in me by Title I of the First War Powers Act, 1941, and as President of the United States, sections 2 and 3 of Executive Order 9406 of December 17, 1943, entitled "Transfer of Functions with Respect to Necessity Certificates from the Secretary of War and the Secretary of the Navy to the Chairman of the War Production Board", are hereby amended to read as follows:

2. (a) The Secretary of War and the Secretary of the Navy shall act upon

(1) all applications for Necessity Certificates filed before October 5, 1943.

(2) applications for Necessity Certificates filed between and including October 5, 1943 and December 17, 1943 describing facilities the beginning of the construction,

reconstruction, erection, installation, or the date of acquisition of which was prior to October 5, 1943, and

(3) applications for Necessity Certificates filed between and including October 5, 1943 and December 17, 1943 describing facilities for which the applicant had made contracts for the construction, reconstruction, erection, installation or acquisition thereof prior to October 5, 1943.

When the Secretary of War and the Secretary of the Navy have made final determination upon all applications specified in this subsection, their functions, powers and duties to issue Necessity Certificates shall cease.

(b) The Chairman of the War Production Board shall act upon

(1) applications for Necessity Certificates filed after December 17, 1943 describing facilities the beginning of the construction, reconstruction, erection, installation or the date of acquisition of which was prior to October 5, 1943. Such applications for Necessity Certificates filed after the effective date of this order shall be filed with the War Production Board.

(2) applications for Necessity Certificates filed on and after October 5, 1943 and pending December 17, 1943 with the Secretary of War and the Secretary of the Navy which describe facilities, the construction, reconstruction, erection or installation of which has not begun or which have not been acquired.

(3) applications for Necessity Certificates filed after December 17, 1943 which describe facilities the construction, reconstruction, erection, or installation of which has not begun or which have not been acquired, and

(4) applications for Necessity Certificates filed after December 17, 1943 describing facilities for which the applicant had made contracts for the construction, reconstruction, erection, installation or acquisition thereof prior to October 5, 1943, provided that such applications are filed prior to April 5, 1944.

(c) The issuance of a Necessity Certificate by either the Secretary of War, the Secretary of the Navy or the Chairman of the War Production Board shall be conclusive of his authority under this section.

3. (a) The regulations of the Secretary of War and the Secretary of the Navy in effect prior to October 5, 1943 shall govern the issuance of Necessity Certificates for all applications for Necessity Certificates describing facilities the beginning of the construction, reconstruction, erection, installation or the date of acquisition of which was prior to October 5, 1943, or for which the applicant had made contracts for the construction, reconstruction, erection, installation or acquisition thereof prior to October 5, 1943.

(b) In acting upon applications for Necessity Certificates filed on and after October 5, 1943 describing facilities the construction, reconstruction, erection, or installation of which was not begun or which were not acquired prior to October 5, 1943, or for which the applicant had not made contracts for the construction, reconstruction, erection, installation or acquisition thereof prior to October 5, 1943, Necessity Certificates shall not be issued unless the Chairman of the War Production Board has determined prior to the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of the facilities (1) that the facilities to be constructed or acquired are clearly necessary for the war effort, and (2)

that it is to the advantage of the Government that such additional facilities be privately financed.

The Secretary of War and the Secretary of the Navy are hereby authorized to amend their regulations governing the issuance of Necessity Certificates to the extent necessary to carry out their functions under this order.

This order shall be effective as of December 17, 1943.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE, *March 2, 1944.*

War Department Regulations, Issuance of Necessity Certificates, 7 Fed. Register 4233:

REGULATIONS PRESCRIBED BY THE SECRETARY OF WAR AND THE SECRETARY OF THE NAVY, WITH THE APROVAL [SIC] OF THE PRESIDENT, GOVERNING THE ISSUANCE OF NECESSITY CERTIFICATES UNDER SECTION 124 (f) OF THE INTERNAL REVENUE CODE

1. *Introductory.* Section 124 of the Internal Revenue Code allows a deduction to corporations, in the computation of taxable income, for the amortization of the cost of emergency facilities over a period of sixty months or less. Allowance of the deduction is subject to certain conditions which include the issuance of Necessity Certificates by the Secretary of War or the Secretary of the Navy under regulations from time to time prescribed by them with the approval of the President. The following are the regulations so prescribed.

Regulations governing other features of Section 124 have been promulgated by the Bureau of Internal Revenue.

2. *Definitions.* As used throughout these regulations

a. "Emergency facility" means any facility, land, building, machinery, or equipment, or part

thereof, the construction, reconstruction, erection or installation of which was completed after June 10, 1940, or which was acquired after such date, and with respect to which a Necessity Certificate has been made.

* * * * *

f. "Necessity Certificate" means a certificate made pursuant to Section 124 (f) of the Internal Revenue Code, certifying that the construction, reconstruction, erection, installation or acquisition of the facilities, referred to in the certificate, is necessary in the interest of national defense during the emergency period.

* * * * *

3. *Determination of necessity.* In determining whether the construction, reconstruction, erection, installation or acquisition of a facility is necessary in the interest of national defense during the emergency period, and that a Necessity Certificate may therefore be issued, the certifying authority will be guided by the following considerations:

a. *Supplies required for national defense.* The certifying authority will consider whether the supply to be produced with the facility sought to be certified is required in the interest of national defense during the emergency period. A supply may be found to be so required if it—

i. is essential to the armed forces of the United States or auxiliary personnel, including civilian defense;

ii. is intended for any nation which may be furnished supplies under any act of Congress or any authorization of the President, or

iii. has only civilian use, but such use (1) will contribute to the release of supplies required in the interest of national defense; (2) is necessary for the operation of de-

fense facilities, or (3) is otherwise in the interest of national defense; *Provided,* That any certification of facilities used for the production of purely civilian supply should conform to policies of the War Production Board, or any other appropriate defense agency.

b. *Shortage of supplies required for national defense.*

i. *General rule.* The certifying authority will consider whether, at the time of the expansion or conversion or at the time of the issuance of the Necessity Certificate, there is an existing or prospective shortage of facilities for the production of the supply which is to be produced by the facility sought to be certified. Every attempt should be made to utilize existing productive capacity in the United States for the production of supplies required in the interest of national defense, through the medium of prime contracts, subcontracts, conversion or otherwise before expansion of facilities for emergency purposes is undertaken. As a general rule, facilities will be certified only if—

(1) an overall shortage exists or is in prospect in the industry producing such supply (no such shortage will be found to exist if the required increase in production could be accomplished substantially as well by an increased or more efficient use of existing plant) and

(2) facilities are not available outside such industry which as a practical matter may be used directly or after adaptation or conversion for the production of such supply.

ii. *Exceptions.*

(1) *Impracticability of using existing facilities elsewhere.* Existing capacity will be regarded as insufficient if, notwithstanding an apparent adequate capacity, facilities are lacking in a particular region and that lack cannot

readily be met by surplus capacity in other regions because of

(a) the excessive cost of transportation;
(b) the need for transportation facilities for other products, or
(c) the desirability of insuring a regional supply.

(2) *Special need by the taxpayer.* In unusual cases existing capacity may be regarded as insufficient if, notwithstanding the existence of an apparent adequate capacity, facilities to produce supplies necessary for national defense are needed by a taxpayer whose qualifications for the manufacture of a special product are recognized as essential to the defense program.

c. *Other considerations.* The certifying authority will be guided by the following additional considerations:

i. *Depreciable assets.* With the exception of land, facilities will not be certified unless they are subject to the deduction provided for by Section 23 (1) of the Internal Revenue Code.

ii. *Land.* Land will not be certified as necessary unless directly related to the production, storage, transportation or protection of supplies required in the interest of national defense.

iii. *Acquisition of going concern.* Acquired facilities previously constituting the principal productve assets of a going concern will not ordinarily be certified unless there is a reasonable prospect of a substantial increase in the usefulness of such facilities resulting from such acquisition and such increase cannot satisfactorily be obtained through subcontracting or unless a probable substantial loss of usefulness would result except for such acquisition.

Exceptions may be made under special circumstances in the case of transfer of ownership of facilities when such facilities were constructed, reconstructed, erected, installed, or ac-

quired by a transferor after the beginning of the emergency period.

iv. *Conversion of non-defense facilities to defense purposes.* In cases where a taxpayer has expanded its facilities to maintain nondefense production because facilities previously so employed were converted to defense work, such expansion will be considered for certification only to the extent of such conversion.

v. *Replacements.* If it is established that replacements would have been made, at or about the time made, regardless of the emergency, they will not be eligible for certification.

d. [As added October 8, 1943, 8 Fed. Register 13,824] The construction, reconstruction, erection, installation, or acquisition of a facility shall not be deemed necessary unless (1) the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of such facility, was prior to October 5, 1943; or (2) an application for a Necessity Certificate describing such facility was filed before October 5, 1943; or (3) the Secretary of War or the Secretary of the Navy, in exceptional cases, has determined prior to the beginning of such construction, reconstruction, erection, installation, or the date of such acquisition, that there is a shortage of facilities for a supply required for military or naval uses and that it is to the advantage of the Government that additional facilities for such supply be privately financed.

* * * * *

5. *Effect of Necessity Certificate.*

a. *General rule.* A Necessity Certificate is conclusive evidence of certification by the certifying authority that the facilities therein described are necessary in the interest of national defense, up to the percentage therein designated of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof after June 10, 1940.

* * * * *

9. *Amendment of regulations.* These regulations may be amended by the Secretary of War and the Secretary of the Navy with the approval of the President.

HENRY L. STIMSON,
Secretary of War.
FRANK KNOX,
Secretary of the Navy.

Approved:
FRANKLIN D. ROOSEVELT,
President.

5/22/42

War Production Board Regulations, Issuance of Necessity Certificates, 8 Fed. Register 16964:

AMENDED REGULATIONS (DECEMBER 17, 1943) GOVERNING THE ISSUANCE OF NECESSITY OF CERTIFICATES UNDER SECTION 124 (F) OF THE INTERNAL REVENUE CODE, PRESCRIBED BY THE CHAIRMAN OF THE WAR PRODUCTION BOARD, WITH THE APPROVAL OF THE PRESIDENT

The following regulations are hereby prescribed by the Chairman of the War Production Board, with the approval of the President, pursuant to the authority contained in Executive Order 9406, dated December 17, 1943:

(1) *Applications for Necessity Certificates to which these regulations apply.* These regulations shall apply to (a) applications for Necessity Certificates filed on and after October 5, 1943 and pending December 17, 1943, with the Secretary of War and the Secretary of the Navy which describe facilities the construction, reconstruction, erection or installation of which has not begun or which have not been acquired, and (b) applications for Necessity Certificates filed after December 17, 1943 which describe facilities the construction, reconstruction, erection, or installation of which has not begun or which have not been acquired.

(2) *Definitions.* As used throughout these regulations:

(a) "Emergency facility" means any facility, land, building, machinery, or equipment or part thereof, the construction, reconstruction, erection or installation of which was completed after December 31, 1939, or which was acquired after such date, and with respect to which a Necessity Certificate has been made.

* * * * *

(f) "Necessity Certificate" means a certificate made pursuant to section 124 (f) of the Internal Revenue Code, certifying that the construction, reconstruction, erection, installation or acquisition of the facilities, referred to in the certificate, is necessary in the interest of national defense during the emergency period.

* * * * *

(3) *Determination of necessity.* In determining whether the construction, reconstruction, erection, installation or acquisition of a facility is necessary in the interest of national defense during the emergency period, and that a Necessity Certificate may therefore be issued, the certifying authority will be guided by the following considerations:

(a) *Supplies required for national defense.* The certifying authority will consider whether the supply to be produced with the facility sought to be certified is required in the interest of national defense during the emergency period. A supply may be found to be so required if it:

(i) Is essential for military or naval uses by the Armed Forces of the United States or auxiliary personnel, including civilian defense, or by any nation which may be furnished supplies under any Act of Congress or any authorization of the President; or

(ii) Is for essential civilian use, domestic or foreign, or for any nation which may be furnished supplies under any Act of Congress or any authorization of the President, and is clearly necessary in the interest of national defense.

(b) *Shortage of supplies required for national defense*—(i) *General rule.* The certifying authority will consider whether, at the time of the expansion or conversion there is an existing or prospective shortage of facilities for the production of the supply which is to be produced by the facility sought to be certified. Every attempt must be made to utilize existing productive capacity in the United States for the production of supplies, through the medium of prime contracts, subcontracts, conversion, greater utilization of existing plant and equipment or otherwise, before expansion of facilities for emergency purposes is undertaken. As a general rule, facilities will be certified only if an over-all shortage of facilities exists or is threatened for producing such supply.

(ii) *Exceptions*—(1) *Impracticability of using existing facilities elsewhere.* Existing capacity will be regarded as insufficient if, notwithstanding an over-all adequate capacity, facilities are lacking in a particular region, there is a necessity of insuring a regional supply, and the lack of the supply cannot be met by surplus capacity in other regions because of the shortage of manpower or transportation facilities.

(c) *Other considerations.* The certifying authority will be guided by the following additional considerations:

(i) *Depreciable assets.* With the exception of land, facilities will not be certified unless they are subject to the deduction provided for by section 23 (l) of the Internal Revenue Code.

(ii) *Land.* Land will not be certified as necessary unless directly related to the produc-

tion, storage, transportation or protection of supplies necessary in the interest of national defense.

(iii) *Acquisition of going concern.* Acquired facilities previously constituting the principal productive assets of a going concern will not ordinarily be certified unless there is a clear prospect of a substantial increase in the usefulness of such facilities resulting from such acquisition and such increase cannot be obtained by other practical means or unless a probable substantial loss of usefulness would result except for such acquisition.

(iv) *Replacements.* If it is established that replacements would have been made, at or about the time made, regardless of the emergency, they will not be eligible for certification.

(v) *Applications for certification of certain facilities must be filed with request for priority assistance or specific authorization.* The issuance of a Necessity Certificate will not be considered for tax amortization of facilities acquired after the issuance of these regulations and for which an application for a Necessity Certificate is filed after the issuance of these regulations, the acquisition of which can be made only with priority assistance or specific authorization of the War Production Board, unless the application for a certificate is filed together with the application for priority assistance or specific authorization; and the specific authorization or priority assistance will not be granted until a determination upon issuance of the Necessity Certificate has been made.

(vi) *Government and privately financed facilities.* Necessity Certificates will be issued only where it is to the advantage of the government that the facilities in question be privately financed.

(d) *Procedure.* The certifying authority may transmit a copy of any application to such other Government department or agency as

may designate, for recommendation. In any such case, no action will be taken by the certifying authority until such other Government department or agency has made its recommendation as to the disposition of such application or has notified the certifying authority that it will make no recommendation.

* * * * *

(5) *Effect of Necessity Certificates*—(*a*) *General Rule.* A Necessity Certificate is conclusive evidence of certification by the certifying authority that the facilities therein described are necessary in the interest of national defense, up to the percentage therein designated of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof after December 31, 1939.

* * * * *

(9) *Amendment of Regulations.* These regulations may be amended by the Chairman of the War Production Board with the approval of the President.

DONALD M. NELSON, *Chairman.*
Approved: December 17, 1943.

FRANKLIN D. ROOSEVELT, *President.*

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.124–6 [as amended by T. D. 5432, 1945 Cum. Bull. 180]. *Adjusted Basis of Emergency Facility.*—

(*a*) *In general.*—The adjusted basis of an emergency facility for purposes of computing the amortization deduction may differ from what would otherwise constitue the adjusted basis of such emergency facility, in that it shall be the adjusted basis for determining gain (see section 113) and in that it may be only a portion of what would otherwise constitute the adjusted basis. It will be only a portion

of such other adjusted basis if only a portion of the basis (unadjusted) is attributable to the certified construction, reconstruction, erection, installation, or acquisition after December 31, 1939. It is therefore necessary first to determine the unadjusted basis of the emergency facility from which the adjusted basis for amortization purposes is derived.

The unadjusted basis for amortization purposes, in cases where the entire construction, reconstruction, erection, installation, or acquisition takes place after December 31, 1939, and such construction, reconstruction, erection, installation, or acquisition is certified in its entirety by the certifying officer as necessary in the interest of national defense during the emergency period, is the same as the unadjusted basis otherwise determined.

In cases where the certifying officer certifies the entire construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as necessary in the interest of national defense during the emergency period, but only a portion of the construction, reconstruction, erection, installation, or acquisition attributable to the facility takes place after December 31, 1939, the unadjusted basis for the purposes of amortization is so much of the entire unadjusted basis as is attributable to that portion of the construction, reconstruction, erection, installation, or acquisition which took place after December 31, 1939. For example, the X Corporation begins the construction of a facility November 15, 1939, and such facility is completed on April 1, 1940, at a cost of $500,000, of which $300,000 is attributable to construction after December 31, 1939. The certificate of necessity covers the entire construction after December 31, 1939, and the unadjusted basis of the emergency facility for amortization purposes is therefore $300,000. For depreciation

of the remaining portion of the cost ($200,000), see section 29.124–7.

If the certifying officer certifies only a portion of the construction, reconstruction, erection installation, or acquisition after December 31, 1939, then the unadjusted basis for amortization purposes is limited to the amount attributable to such portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939. Assuming the same facts as in the example in the preceding paragraph, except that the certificate is to the effect that only 50 percent of the construction after December 31, 1939, is necessary in the interest of national defense during the emergency period, the unadjusted basis for amortization purposes is 50 percent of $300,000 or $150,000.

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